

No. 12,688

IN THE

United States Court of Appeals
For the Ninth Circuit

J. HOWARD McGRATH, Attorney General of the United States, and D. W. BREWSTER, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii,

Appellants,

vs.

CHUNG YOUNG,

Appellee.

BRIEF FOR APPELLANTS.

RAY J. O'BRIEN,

United States Attorney for the District of Hawaii,

HOWARD K. HODDICK,

Assistant United States Attorney for the District of Hawaii,

FRANK J. HENNESSY,

United States Attorney for the Northern District of California,

Attorneys for Appellants.

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Subject Index

	Page
Statement of the pleadings and facts	1
Statement of the case	2
Specification of errors	4
Argument	6
1. The judgment of the District Court is not supported by a preponderance of the evidence	6
2. The District Court erred when it refused to admit evidence which would have impeached the credibility of witnesses who testified in support of the appellee's 1923 admission	8
3. The District Court erred when it refused to admit evidence which would have impeached the appellee's credibility	8
Conclusion	9

Table of Authorities Cited

Cases	Pages
Bauer v. Clark, 161 F. (2d) 397, 400 (1947, 7 CCA)	6
Gan Seow Tung v. Clark, 83 F. Supp. 482, 486 (1949, S.D. Calif.)	6
Lum Mon Sing v. United States, 124 F. (2d) 21, 23 (1941, 9 CCA)	6, 7
Mock Kee Song v. Cahill, 94 F. (2d) 975, 977 (1938, 9 CCA)	7
United States ex rel. Vajta v. Watkins, 88 F. Supp. 51, 54 (1949, S.D. N.Y.)	7

Statutes

Title 8 U.S.C. §903 (Nationality Act of 1940, §503), 54 Stat. 1171	6
Title 28 U.S.C. §§1291 and 1294	6

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BRIEF FOR APPELLANTS.

STATEMENT OF THE PLEADINGS AND FACTS.

This is an appeal by J. Howard McGrath, Attorney General of the United States, and D. W. Brewster, District Director, Immigration and Naturalization Service for the District and Territory of Hawaii, Defendant-Appellants, from a judgment entered by the United States District Court for the District of Hawaii in favor of Chung Young, Plaintiff-Appellee. Appellee brought suit in the District Court on Janu-

ary 25, 1950 for a judgment declaring him to be a national of the United States. (R. 2-6.) The Appellants filed a general denial on March 24, 1950. (R. 7.)

Jurisdiction of the District Court was invoked under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 8 U.S.C. § 903. Findings of Fact and the Judgment of the District Court were entered on April 29, 1950 and filed on May 3, 1950. (R. 7-10.) The Appellants filed a Notice of Appeal from that judgment to this Honorable Court on June 29, 1950. (R. 11.) On August 8, 1950 the District Court issued an order extending the time for perfecting the record on appeal until September 25, 1950. (R. 12.)

The jurisdiction of this Court is invoked under the provisions of §§ 1291 and 1294 of Title 28, U.S.C.

STATEMENT OF THE CASE.

At the trial of this cause, had on April 26, 1950 the Appellee testified in support of the allegations contained in his complaint that he had been born in Honolulu on April 26, 1901 (R. 15), that his mother took him to China on June 3, 1902 on a ship called the Coptic (R. 16-18), that he returned to Honolulu on October 26, 1923 and was admitted to the United States as a citizen thereof at that time (R. 16, 17), and that the Immigration and Naturalization Service had denied his application for a certificate of citizenship, actually a Certificate of Citizenship-Hawaiian Islands. (R. 17.)

On cross-examination the Appellee identified Certificate of Death No. A-502, dated December 6, 1948, covering the demise of one Lai Young as the certificate of his father's death which he had submitted to the Immigration and Naturalization Service. (R. 19-21, 25.)

The Appellee called no other witnesses.

The Appellants endeavored to prove that other applicants for admission to the United States had claimed the same death record claimed by the Appellee, that is, they also claimed that Lai Young was their father. The District Court refused to admit this evidence. (R. 25, 26.) The District Court also refused to admit evidence offered by the Appellants that witnesses who had testified in support of Appellee's admission to the United States in 1923 had also testified in support of the admissions of numerous other persons whom the Immigration and Naturalization Service had probable cause to believe were not citizens of the United States. (R. 22-25.)

The Appellants offered and there was received in evidence as Defendant's Exhibit No. 1 the manifest listing all passengers who sailed on June 3, 1902 from Honolulu to China on the Coptic. (R. 32.) This exhibit is a part of the record on appeal and neither the name of the Appellee nor the name of his mother (Hung She) (R. 28), appears on the manifest.

SPECIFICATION OF ERRORS.

1. The District Court erred when it refused to admit the testimony of Appellants' witness Robert E. Lee that witnesses who testified in support of the Appellee's admission to the United States in 1923 had also testified in support of the admission of numerous other applicants whom the Immigration and Naturalization Service had probable cause to believe were not citizens of the United States.

Testimony of Robert E. Lee (R. 22-25):

"Q. Did you review the files of the Immigration Service to find out whether these witnesses had appeared in behalf of other applicants for admission to the United States?

Mr. Botts. Objected to as incompetent, irrelevant, and immaterial. We are not concerned, your Honor, with what they have done; whether they have been witnesses in other cases or not has nothing to do with the issue here; we are concerned with their testimony here, their appearance and their testimony here. That way of a back door attack upon witnesses seems to be the favorite of the Immigration Service and is condemned by the courts, repeatedly condemned by them. Witnesses appeared, they were questioned as to their knowledge of this young man's birth here. I assume Counsel wants to say they were witnesses in some other doubtful cases. That is the usual line, but you can't deny this man's citizenship on that account. If we pursue this, we will find out both of these witnesses are dead and can't speak for themselves. This man is here. He has testified here. If they have evidence to show he

was not born here, we will be glad to have them produce it, but not this back door method of un-American approach to an issue.

(Argument by Mr. Hoddick and by Mr. Botts.)

The Court. It seems rather far-fetched to me and so much so as to be immaterial in this case.

Mr. Hoddick. May I note an exception to the Court's ruling?

The Court. Yes."

2. The District Court erred when it refused to admit the testimony of Appellants' witness Robert E. Lee that the death record of Lai Young, claimed by the Appellee, had also been claimed by numerous other applicants, not related to the Appellee, for admission to the United States.

Testimony of Robert E. Lee (R. 25, 26):

"Q. (by Mr. Hoddick.) Mr. Lee, showing you Certificate of Death No. A-502, covering the death of one Lai Young, which was previously shown to the plaintiff, I ask you if you have examined the records of the Immigration and Naturalization Service for the purpose of determining whether other applicants for admission to the United States have claimed that same death record?

Mr. Botts. We object to that on the same ground, your Honor. This man has testified that that is his father's death record. Now, if Counsel has any evidence to prove it is not his death record, we will welcome it, but to say that some other Chinese have tried to eneroach upon that or tried to use it as their own comes in the same class as this other objection. We object to that,

if your Honor please. It doesn't make any difference. We are not bound by what other Chinese have done unless they can connect us up with it. If Counsel is able to show that death record does not belong to this man, we will be glad to have him do it, but to say some other Chinese, who are strangers to us, have laid some claim to it is immaterial, a vicarious way of handling the situation.

Mr. Hoddick. I have the same answer to that argument as I did on the previous question.

The Court. Objection sustained.

Mr. Hoddick. Note an exception.

The Court. Exception noted.

3. The District Court erred in that its judgment is not supported by a preponderance of the evidence.

ARGUMENT.

1. THE JUDGMENT OF THE DISTRICT COURT IS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE.

In a declaratory judgment suit brought under Section 503 of the Nationality Act of 1940, 8 U.S.C. 903, the plaintiff has the burden of proof and must prove his case by a preponderance of the evidence. *Bauer v. Clark*, 161 F. (2d) 397, 400 (1947—7 CCA); *Lum Mon Sing v. United States*, 124 F. (2d) 21, 23 (1941—9 CCA); *Gan Seow Tung v. Clark*, 83 F. Supp. 482, 486 (1949—S.D.Calif.).

The admission of the Appellee to the United States as a citizen thereof in 1923 is not *prima facie* evidence that he is a citizen or national of the United

States. *Lum Mon Sing v. United States*, supra at 23; *Mock Kee Song v. Cahill*, 94 F. (2d) 975, 977 (1938—9 CCA); *United States ex rel Vajta v. Watkins*, 88 F. Supp. 51, 54 (1949—S.D.N.Y.). In the *Lum Mon Sing* case this Court said:

“First. Appellant contends that the determination of citizenship in 1922 created a prima facie case which could only be overcome by evidence. The immigration officials in 1941 considered its decision of 1922. It was required to do no more, and the burden of proof was still on appellant in 1941.”

In the instant case the only evidence offered by the Appellee in support of his claim to United States citizenship was his own testimony (R. 15-21) and the record of the Board of Special Inquiry which admitted him in 1923. (R. 34.) The attention of the Court is called to the Appellee's testimony that on June 3, 1902 he departed from Honolulu for China with his mother, Hung She, on the Coptic. (R. 16-18.) Defendants' Exhibit No. 1, the manifest listing all passengers on that trip of the Coptic and which is a part of the record on this appeal, reveals that neither the Appellee nor his mother was a passenger aboard the Coptic when it departed from Honolulu on June 3, 1902. The record covering the Appellee's admission to the United States in 1923 was, of course, considered by the immigration officials when the Appellee applied for a Certificate of Citizenship-Hawaiian Islands (R. 22) but said record has not been made a part of this record on appeal.

Given the interest of the Appellee in this suit and the discrepancy between his testimony and the manifest it is submitted that the Appellee did not sustain the burden of proof.

2. THE DISTRICT COURT ERRED WHEN IT REFUSED TO ADMIT EVIDENCE WHICH WOULD HAVE IMPEACHED THE CREDIBILITY OF WITNESSES WHO TESTIFIED IN SUPPORT OF THE APPELLEE'S 1923 ADMISSION.

The Appellants offered evidence which would have proved that witnesses who testified in support of the Appellee's admission to the United States were "professional" witnesses who had testified in support of the admission of numerous other persons whom the Immigration and Naturalization Service had probable cause to believe are not citizens of the United States. (R. 22-25.) This evidence would have shown that Appellee's 1923 admission was entitled to little weight. Such evidence was material and its exclusion constituted error prejudicial to the Appellants. *Lum Mon Sing v. United States*, supra at 21.

3. THE DISTRICT COURT ERRED WHEN IT REFUSED TO ADMIT EVIDENCE WHICH WOULD HAVE IMPEACHED THE APPELLEE'S CREDIBILITY.

The Appellee claimed that he was born in Honolulu, that his father was one Lai Young, and in support of that claim he submitted to the Immigration and Naturalization Service the death certificate of Lai Young, his purported father. (R. 18-21.) The Appellants of-

ferred evidence that numerous other persons, unrelated to the Appellee, had also claimed that the same death certificate related to the death of their fathers. This testimony which would have reflected on the credibility of the Appellee was not admitted in evidence by the District Court. (R. 25-26.) This evidence was material and the refusal of the District Court to admit it was prejudicial error.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be set aside and reversed.

Dated, Honolulu, T. H.,
December 22, 1950.

RAY J. O'BRIEN,

United States Attorney for the District of Hawaii,

HOWARD K. HODDICK,

Assistant United States Attorney for the District of Hawaii,

FRANK J. HENNESSY,

United States Attorney for the Northern District of California,

Attorneys for Appellants.

